UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRUSTEES OF INTERNATIONAL PENSION FUND, INTERNATIONAL HEALTH FUND, INTERNATIONAL MASONRY INSTITUTE APPRENTICESHIP FUND, AND MASONRY INSTITUTE FUND,	)	
Plaintiffs	)	
v.	)	Civil No. 99-130-P-B
PAUL G. WHITE TILE CO.,	)	
Defendant	)	

ORDER ON DEFENDANT'S MOTION TO AMEND AND RECOMMENDED DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs bring this suit under the Employee Retirement Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*., to collect contributions that allegedly Defendant failed to pay. Before the Court are Defendant's Motion to Amend (Docket No. 6) and Plaintiffs' Motion for Summary Judgment (Docket No. 9). For reasons explained below, Defendant's Motion to Amend is DENIED and I recommend that Plaintiffs' Motion for Summary Judgment be GRANTED in part and DENIED in part.

Motion to Amend

Plaintiffs seek leave to file the Proposed Amended Complaint pursuant to Fed. R. Civ. P. 15(a) to add the affirmative defense that Plaintiffs failed to exhaust the contractual remedies under the 1993-1995 collective bargaining agreement. Under Fed. R. Civ. P. 15(a), a party must seek leave of the court to amend a pleading after the time period for amending the pleading without leave expires. Leave to amend "shall be granted when justice so requires." Fed. R. Civ. P. 15(a). The rule

"evinces a definite bias in favor of granting leave to amend." *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1178 n. 11 (1st Cir. 1995) (citing *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985)). However, leave to amend may be denied under certain circumstances which include, "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Defendant argues that Plaintiffs' ERISA claim is barred because Plaintiffs failed to exhaust contractual remedies and comply with the mandatory dispute resolution procedures set forth in the collective bargaining agreement. When a party institutes an ERISA action claiming *a denial of benefits* under the Act, the exhaustion doctrine applies. *United Paperworkers International Union, Local 14, AFL-CIO-CLC v. International Paper Co.*, 777 F. Supp. 1010, 1014 (D. Me 1991). However, where as here, Plaintiffs assert a statutory-based violation of ERISA, most courts have held that the plaintiffs are not required to exhaust contractual remedies. *Id.* at 1017. This Court has followed the majority of other courts and has held that when a plaintiff asserts a statute-based ERISA claim, the plaintiff does not need to exhaust the remedies under the existing collective bargaining agreement before filing suit. *Id.* at 1017. Accordingly, Defendant cannot assert this defense.

Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). "A trialworthy issue

exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico,* 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting *National Amusements v. Town of Dedham,* 43 F.3d 731, 735 (1st Cir. 1995)).

Statement of Facts

The International Pension Fund, the International Health Fund, the International Masonry Institute Apprenticeship Fund, and the International Masonry Institute Fund ("Plaintiffs" or "Funds") are "multi-employer plans" and "employer benefit plans" under ERISA. 29 U.S.C. § 1002 (3) & (37)(A). Plaintiffs' SMF at ¶ 1.

In July 1993, Defendant signed the Special International Masonry Industry Agreement with the International Union of Bricklayers and Allied Craftsmen ("International Agreement"). *Id.* at ¶ 2. Also in July 1993, Defendant signed a collective bargaining agreement effective from May 1, 1993 through April 30, 1995 with the International Union of Bricklayers and Allied Craftsmen, Local No. 1 Northern New England ("collective bargaining agreement" or "CBA"). *Id.* at ¶ 5. Although Defendant never signed the 1998-2000 CBA, Article XV of the 1993-1995 CBA provides that unless a party to the CBA gives notice that it intends to change or terminate the agreement, the agreement will continue on a year-to-year basis. Neither party has terminated the agreement.

The 1993-1995 CBA binds the parties to the provisions of the written Agreement and Declaration of Trust of the Health and Welfare, Pension, Flexible benefits, and Annuity Fund, and any amendments to the trust. Pls. SMF at ¶ 8. Article II of the CBA establishes the hourly rates which employers are required to contribute to the funds. Pls. SMF at ¶ 8. Article VII of the CBA

requires the employer to provide in any subcontract that the subcontractor assume the terms and conditions of the collective bargaining agreement. *Id.*

The International Agreement provides that:

> This Agreement covers all construction work within the jurisdiction of the International Union as defined in the Constitution of the International Union, as well as all other work normally and traditionally assigned to and performed by employees represented by the International Union of Bricklayers and Allied Craftsman.
>
> The Employer agrees to assign to employees . . . represented by BAC [International Union of Bricklayers and Allied Craftsman] all work that has been historically or traditionally assigned to members of the International Union of Bricklayers and Allied Craftsman, including but not limited to: all forms of masonry construction, including all brick, stone, concrete block, marble, plaster, mosaic, tile terrazzo, terra cotta, glass block, refractory materials, and pointing-cleaning-calking work, the complete installation of all forms of masonry panels including the off and/or on site fabrication, all integral elements of masonry construction and all forms of substitute materials or buildings systems thereto utilized in all forms of construction, maintenance, repair and renovation.
>
> In addition, the Employer agrees to assign to employees represented by BAC all other work assignments mutually agreed upon between the Employer or the Local Unions, and all such work shall be covered by this Agreement.

Exhibit 56, Article II (A)-(C).

Mr. White contends that the work "historically", "normally" or "traditionally" assigned to union workers in Northern New England only includes ceramic, terrazzo, and marble installation and repair. Def. Statement of Facts ¶ 4. Richard Joy, the local union representative referenced in Article II(c) of the International Agreement, told Defendant that the agreement only covered ceramic, terrazzo, and marble work performed on commercial projects. Def. Statement of Facts ¶ 7. Mr. Joy indicated that the CBA did not cover "residential installers". *Id.* at ¶ 14. Mr. Joy told Mr. White during negotiations over the contract that sublet or transferred work must be given to contractors covered by the CBA if contractors were available through the union hall. *Id.* ¶ 14. Mr. Joy

indicated that no contributions for the pension funds were due except for work performed by union employees setting tile. *Id.*

Mr. Joy was responsible for negotiating and binding the union to the collective bargaining agreements. *Id.* ¶ 8. Defendant refrained from terminating the 1993-1995 CBA after 1995 based on Mr. Joy's explanation of the scope of the agreement. At no time subsequent to signing the agreement did Mr. Joy ever object to Mr. White regarding the company's compliance with the agreement. *Id.* ¶ 12.

Discussion

Plaintiffs seek to collect contributions that allegedly Defendant failed to pay as required under the various signed agreements. Plaintiffs bring this claim under 29 U.S.C. § 1145 which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Defendant asserts two defenses in its Response to Plaintiffs' Motion. First, Defendant contends that Plaintiffs are estopped from asserting a construction of the agreement contrary to Mr. Joy's representations to Mr. White regarding the agreement. Second, Defendant contends that Plaintiffs failed to submit the dispute to the alternative mandatory dispute resolution as provided in the 1993-1995 CBA. The Court addresses each argument below.

A. Estoppel

Plaintiffs argue that Defendant cannot assert an estoppel defense on this ERISA claim. Plaintiffs correctly point out that the cases cited by Defendant to support the assertion of estoppel

in an ERISA action involve claims for individual benefits against an ERISA plan, not claims by an employer against a multiple-employer plan. *See Cleary v. Graphic Communications Int'l Union Supplemental Retirement and Disability Fund,* 841 F.2d 844 (1st Cir. 1988); *Reid v. Gruntal & Co., Inc.,* 760 F. Supp. 945 (D. Me. 1991). The Seventh Circuit Court of Appeals warned against applying estoppel in ERISA actions:

> One scholar, noting the trend toward allowing use of estoppel in ERISA cases, has noted that where estoppel is disallowed, the pension plan involved is ordinarily a multi-employer plan. S. Bruce, Pension Claims: Rights and Obligations 404 (1988). The reason for reluctance in such cases is the fact that the plan has multiple fiduciaries with control over a common fund. To allow one employer to bind the fund to pay benefits outside the strict terms of the Plan would be to make all the employers pay for one employer's misrepresentations, and to the extent that such payments damage the actuarial soundness of the Plan, it hurts all the employees as well.

Black v. TIC Investment Corp., 900 F.2d 112, 115 (7th Cir.1990).

Relying primarily on this passage in *Black*, later district court cases refused to apply estoppel when a party attempted to seek payment from a multi-employer plan. *See Weatherly v. Illinois Bell Tel.,* 856 F. Supp. 1301, 1306-07 (N. D Ill. 1994); *Spencer v. Central States Pension Fund,* 778 F. Supp. 985, 994-95 (N.D. Ill. 1991).

Plaintiffs rely on *Black* and its progeny to support the argument that Defendant cannot assert an estoppel defense in this action. However, in *Black* the plaintiff sued the multi-employer plan seeking payment that the plaintiff alleged a plan representative promised it would make on behalf of the plaintiff. Here, the employer is asserting an estoppel defense alleging that it relied on Plaintiffs' agent's statements and subsequent silence regarding the amount of contribution the Defendant must make to the plan. *See Central States v. Hoosier Bulk Transport, Inc.,* No. 97 C 4431, 1999 WL 965233 at *3 (N.D. Ill. Sept. 30, 1999). On the basis of this distinction a district

court sitting in the Seventh Circuit has held in a post-*Black* case the "the law of this Circuit does not bar the estoppel defense" against a multi-employer fund when *an employer* is sued by the plan for contributions to the plan. *Pattern Makers' Pension Trust Fund v. Production Pattern Shop, Inc.*, No. 97 C 6524, 1998 WL 173299 (N.D. Ill. April 7, 1998) (italics added). In *Pattern Makers* the court determined that the Seventh Circuit implicitly recognized the estoppel defense by ruling against the defendant-employer because he failed to prove the defense, not because the defense was barred. *Pattern Makers*, 1998 WL 173299 (N.D. Ill. April 7, 1998) *(*citing *Illinois Conference of Teamsters & Employers Welfare Fund v. Mrowicki*, 44 F.3d 451, 462-464 (7th Cir. 1995)). A court within this Circuit likewise permitted the assertion of the estoppel defense in a similar situation. *Teamsters Local 251, Health Services and Ins. Fund v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 251***,** 689 F. Supp. 48 (D.R.I. 1988). Although the weight of authority appears to permit the assertion of the estoppel defense the Court need not decide whether estoppel is available in this case because the facts asserted by Defendant cannot support an estoppel defense.

To assert an estoppel defense the defendant must show: (1) a representation of fact made to the defendant; (2) a rightful reliance thereon; and (3) an injury or damage to the defendant caused by reliance on the representation. *Cleary*, 841 F.2d at 447. Here, Defendant contends that he rightfully relied on the statements of Mr. Joy, the local union representative responsible for negotiating the CBA. However, the law is clear that even if Mr. Joy made the representations asserted by Defendant, estoppel requires that Plaintiffs, not the union, make the misrepresentations. *Hoosier Bulk*, 1999 WL 965233 at *4; *Also see Central States, Southeast and Southwest Areas Pension Fund v. Joe McClelland, Inc.*, 23 F.3d 1256 (7th Cir. 1994) ("No matter what an employer and local union agree orally, the collective bargaining and contribution agreements establish the

employer's obligation to the pension fund, which is not party to local understandings and limitations."). Accordingly, based on the facts alleged by Defendant, it cannot assert an estoppel defense.[1]

B. Damages

Plaintiffs maintain that, in accordance with 29 U.S.C. § 1132(g)(2), Defendants owe Plaintiffs a total of $1,539,999.10 as follows:

(a) unpaid contributions in the amount of $881,533.63;

(b) interest in the amount of $308,507.93 on the principal amount of delinquent contributions; and

(c) attorney fees and costs in the amount of $41,449.76.

Plaintiffs hired Michael P. Ross, an accountant to review Defendant's records and conduct an audit to determine the amount of contributions Defendant underpaid to the Funds. [2] Mr. Ross concluded that Defendant underreported the hours of union and non-union employees. Pls' SMF ¶¶ 5-7. According to Mr. Ross Defendant owes a total of $339,915.58 in contributions for hours

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[1] Defendant requests in their January 24, 2000 Response that the Court withhold judgment on the estoppel issue until a Court adjudicates a motion to compel Defendant intends to file in another district. Fed. R. Civ. P. 56(f). Defendant anticipates that such documents would provide further evidence of Mr. Joy's ability to bind Plaintiffs. At the Final Pre-Trial Conference Defendant stated that it had not yet filed the motion to compel but intended to do so by March 9, 2000, more than two months after the discovery deadline. Due to the delay, solely caused by Defendant, in filing the motion, the Court refuses to withhold judgment.

[2] Defendant argues that Plaintiffs failed to designate Mr. Ross as an expert witness and therefore Mr. Ross's testimony regarding the amount of contributions owed by Defendant is inadmissable. Plaintiffs argue that Mr. Ross may offer testimony as a lay witness under Fed. R. Evid. 701. I am satisfied that Mr. Ross may offer lay testimony concerning his personal knowledge of Defendant's records. *See Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 403-404 (3rd Cir. 1980). Accordingly, I will consider Mr. Ross's testimony regarding his review and subsequent audit of Defendant's records.

worked by union employees and $541,618.05 in contributions for hours worked by non-union employees for a total of $881,533.63.

Defendant disputes Mr. Ross's calculations on several grounds based upon a review of the records by Mr. White. Defendant claims that Mr. Ross's calculations for union employees' hours are over inclusive because they include travel, holidays, vacation and personal time, for which no contributions are due, and also include contributions for non-ceramic employees and non-union employees. Def. SMF ¶ 11. Defendant also disputes Mr. Ross's calculations of non-union installers it employed and Mr. Ross's calculations of under-reported hours and delinquent contributions for subcontractors as being overly inclusive. Def. SMF ¶ 12.

Based on Mr. Ross's assumption that the agreement applies to all work performed by union employees, Defendant contends that it owes only $108,279.20 in contributions. Mr. White also contends that the contributions due for non-union employees and subcontractors covered by the agreement are significantly less than the amount reached by Mr. Ross. Def. SMF ¶ 12.

Based on the facts asserted by Defendant, the Court is satisfied that a genuine issue of material fact exists regarding the amount of delinquent contributions Defendant owes to Plaintiffs. I am further satisfied that although an estoppel defense is unavailable, Defendant may, on the issue of damages, present evidence on how its interpretation of the agreement affects the amount of delinquent contributions owed to the Fund. I also recommend that the amount of interest that applies to any award and the amount of reasonable attorney's fees and costs under 29 U.S.C. § 1132(g)(2) be reserved until the time judgment is entered.

Conclusion

For reasons stated above, Defendant's Motion to Amend is DENIED and I recommend that Plaintiffs' Motion for Summary Judgment be GRANTED in part and DENIED in part.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
United States Magistrate Judge

Dated on March 21, 2000.

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STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-130

TRUSTEES OF INTERNAT, et al v. PAUL G WHITE TILE CO Filed: 04/26/99
Assigned to: JUDGE MORTON A. BRODY
Demand: $0,000 Nature of Suit: 791
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 29:1001 E.R.I.S.A.: Employee Retirement

TRUSTEES OF INTERNATIONAL JONATHAN S. R. BEAL, ESQ.

PENSION FUND plaintiff	[COR LD NTC] FONTAINE & BEAL, P.A. 482 CONGRESS ST P.O. BOX 7590 PORTLAND, ME 04112 879-1879 MICHAEL A. FEINBERG, ESQ. [COR] RENEE BUSHEY, ESQ. [COR NTC] FEINBERG, CHARNAS & BIRMINGHAM, P.C. 177 MILK STREET BOSTON, MA 02109
INTERNATIONAL HEALTH FUND plaintiff	JONATHAN S. R. BEAL, ESQ. (See above) [COR LD NTC] MICHAEL A. FEINBERG, ESQ. (See above) [COR] RENEE BUSHEY, ESQ. (See above) [COR NTC]
INTERNATIONAL MASONRY INSTITUTE APPRENTICESHIP FUND plaintiff	JONATHAN S. R. BEAL, ESQ. (See above) [COR LD NTC] MICHAEL A. FEINBERG, ESQ. (See above) [COR] RENEE BUSHEY, ESQ.

Proceedings include all events. TRLIST
2:99cv130 TRUSTEES OF INTERNAT, et al v. PAUL G WHITE TILE CO PORTLD STNDRD

	(See above) [COR NTC]
INTERNATIONAL MASONRY INSTITUTE FUND plaintiff	JONATHAN S. R. BEAL, ESQ. (See above) [COR LD NTC] MICHAEL A. FEINBERG, ESQ.

(See above)
[COR]
RENEE BUSHEY, ESQ.
(See above)
[COR NTC]

v.

PAUL G WHITE TILE CO
defendant

ANNE M. CARNEY, ESQ.
[COR LD NTC]
NORMAN, HANSON & DETROY
415 CONGRESS STREET
P. O. BOX 4600 DTS
PORTLAND, ME 04112
774-7000